



Florida Department of Environmental Protection

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3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

CERTIFIED - RETURN RECEIPT REQUESTED

February 08, 2008

U.S. Army Corps of Engineers
c/o Ms. Marie Burns
Jacksonville District
P.O. Box 4970
Jacksonville, FL 32232

Permit Modification No. 0216012-010-EM
Permit No. 0216012-007-JC, Palm Beach County
Palm Beach Harbor Maintenance Dredging (Nighttime Work)

Dear Ms. Burns:

Your January 25, 2008, request to modify Permit No. 0216012-007-JC has been received and reviewed by Department staff. The proposed permit modification is to correct an error by removing manatee protection language that prohibits all nighttime work.

The following information describes the project history from the time Permit No. 0216012-007-JC was issued, and the subjects directly related to the proposed modification. For additional background, and the history of the project prior to Permit No. 0216012-007-JC, please see the *Consolidated Notice of Intent to Issue* for Joint Coastal Permit (JCP) No. 0216012-007-JC, dated July 28, 2006, available at the Bureau website:

http://bcs.dep.state.fl.us/env-prmt/palm_bch/issued/0216012_Palm_Beach_Harbor/007-JC/

BACKGROUND/HISTORY

On September 21, 2006, the Department issued Permit No. **0216012-007-JC** to the U.S. Army Corps of Engineers (USACE). This major modification of Permit No. **0216012-001-JC** is to maintenance dredge the entire navigation-related complex at Palm Beach Harbor/Lake Worth Inlet. Dredged material is to be placed within the beach template, landward of the -17-foot mean low water (MLW) contour. The design berm has an elevation of approximately +8.7 feet (MLW), with a 1V:20H seaward slope. Placement of material begins immediately south of the south jetty, and proceeds in a southerly direction. If, during a single dredging event, the beach template immediately south of the Lake Worth Inlet becomes filled, beach-quality sand may be placed within the Mid-Town template, in accordance with Permit Modification No. **0164713-002-EM**. Within the entrance channel (between USACE Stations 25.0 to 56.0), shoals of less than 5,000 cubic yards may be transferred to deeper parts of the channel to temporarily alleviate

navigational hazards. An artificial reef will be constructed to offset the impact (i.e., burial) of the patch hardbottom reef (approximately 0.12 acre) between DEP reference monuments R-78 and R-79.

On September 14, 2006, immediately prior to the issuance of Permit No. 0216012-007-JC, the Department issued Permit Modification No. **0216012-008-EM**. This minor modification was requested (before Permit No. 0216012-007-JC was finalized) to facilitate emergency dredging of a hurricane-induced shoal by authorizing the use of mechanical dredges (e.g., backhoe or clamshell types).

Emergency dredging of the hurricane-induced shoal began September 22, 2006, and was completed on November 14, 2006. Regular maintenance dredging commenced on February 16, 2007, and continued until April 19, 2007.

On June 8, 2007, the Department issued a *de minimus* exemption for the rehabilitation of the south jetty (File No. **0216012-009-EM**).

JUSTIFICATION/NECESSITY

The sentence in the manatee protection condition that prohibits all in-water activities after sunset is an apparent error that conflicts with other provisions of the manatee-related requirements. Removal of this nighttime prohibition is necessary to make the pending construction contract feasible.

STAFF ASSESSMENT

After consulting with the Florida Fish and Wildlife Conservation Commission (FWC), the Department has confirmed that it was not the State's intention to prohibit all in-water activity at night. Nighttime dredging using mechanical dredges is not allowed, but that is clearly indicated in a separate sub-condition. Otherwise, the permit was only meant to direct the USACE to utilize extra caution and *limit* in-water activities at night to the maximum extent practicable.

The specific conditions shall be revised as follows (~~strike throughs~~ are deletions, underlines are additions):

SPECIFIC CONDITIONS:

11. **Manatee Protection.** The permittee shall comply with the following manatee protection construction conditions:
 - a. The permittee shall instruct all personnel associated with the project of the potential presence of manatees and the need to avoid collisions with manatees. All construction personnel are responsible for observing water-related activities for the presence of manatee(s).

- b. The permittee shall advise all construction personnel that there are civil and criminal penalties for harming, harassing, or killing manatees which are protected under the Marine Mammal Protection Act of 1972, The Endangered Species Act of 1973, and the Florida Manatee Sanctuary Act.
- c. Dredging operations shall be conducted in such a manner and suspended as necessary to preclude impacting and/or avoiding collisions with manatees. All vessels should proceed in a cautionary manner that enables an on-board watch to look for manatees. The observer(s) shall contact the captain of the vessel in order to reduce the speed or alter the course, as necessary, should any manatees be observed. For the smaller boats associated with this project, the vessel operator can fulfill this requirement.
- d. Shallow draft vessels, preferably of the light-displacement type, shall be used whenever practicable for transporting personnel to and from the dredge.
- e. Siltation barriers shall be made of material in which manatees cannot become entangled, shall be properly secured, and shall be regularly monitored to avoid manatee entrapment. Barriers must not block manatee entry to or exit from essential habitat.
- f. Inner Channel, Turning Basin, Extended Basin, Entrance Channel and Settling Basin construction/dredging shall be allowed year round, with the use of manatee observer(s) during the duration of the project that coincides with the aggregation of manatees at the power plant (November 15 through March 31). During this time vessel movement at night within the Inner Channel, Turning Basin, and Extended Basin will be minimized to the greatest extent practicable, since the possibility of spotting animals is negligible. All vessels shall travel at speeds no greater than idle speed while inshore.
- g. All vessels associated with the construction project shall operate at "no wake/idle" speeds at all times while in the construction area and while in water where the draft of the vessel provides less than a four-foot clearance from the bottom. All vessels will follow routes of deep water whenever possible.
- hf. Observer(s) must be placed aboard the dredging equipment to maintain a watch for manatees during dredging operations and during the dredge transit to and from the disposal site. At least one manatee observer should be posted to observe the presence of animals for every large vessel/barge

utilized. At least one person shall be designated as a manatee observer when in-water work is being performed. That person shall have experience in manatee observation. The manatee observer must be on site during all in-water construction activities, and shall advise personnel to cease operations upon sighting a manatee within 50 feet of any in-water construction activity. ~~Movement of a work barge, other associated vessels, or any in-water work shall not be performed after sunset, when the possibility of spotting manatees is negligible.~~

- ig. If manatee(s) are seen within 100 yards of the active daily construction/dredging operation or vessel movement, all appropriate precautions shall be implemented to ensure protection of the manatee. These precautions shall include the operation of all moving equipment no closer than 50 feet of a manatee. Operation of any equipment closer than 50 feet to a manatee shall necessitate immediate shutdown of that equipment. Activities will not resume until the manatee(s) has departed the project area of its own volition.
- jh. Any collision with and/or injury to a manatee shall be reported immediately to the FWC Hotline at 1-888-404-FWCC. Collision and/or injury should also be reported to the U.S. Fish and Wildlife Service in Vero Beach (1-772-562-3909).
- ki. Temporary signs concerning manatees shall be posted prior to and during all construction/dredging activities. All signs are to be removed by the permittee upon completion of the project. A sign measuring at least 3 ft. by 4 ft. which reads *Caution: Manatee Area* will be posted in a location prominently visible to water related construction crews. A second sign should be posted if vessels are associated with the construction, and should be placed visible to the vessel operator. The second sign should be at least 8 ½" by 11" which reads *Caution: Manatee Habitat. Idle speed is required if operating a vessel in the construction area. All equipment must be shutdown if a manatee comes within 50 feet of operation. Any collision with and/or injury to a manatee shall be reported immediately to the FWC Hotline at 1-888-404-FWCC. The U.S. Fish and Wildlife Service should also be contacted in Vero Beach (1-772-562-3909).*
- lj. If mechanical dredges (e.g., backhoe or clamshell) are used, NO nighttime dredging shall occur. No mechanical dredges shall be used between November 15 and March 31.

- mk. Mechanical dredging is authorized for one shoal removal event in the fall of 2006. For subsequent use of mechanical dredges, the permittee must acquire written approval from the Department, in consultation with FWC.

After thorough review of your application, staff finds that the proposed modification is not expected to adversely affect water quality or be contrary to the public interest. Staff has also determined that the proposed alteration does not increase the potential for adverse impact on the coastal system, public beach access seaward of the mean high water line or nesting sea turtles and hatchlings and their habitat, and that the proposed alteration does not reduce the design adequacy of the project. Since the proposed modification is not expected to result in any adverse environmental impact or water quality degradation, the **permit is hereby modified** as stated above. By copy of this letter, we are notifying all necessary parties of the modification.

This letter of approval does not alter the **March 17, 2015**, expiration date, other Specific or General Conditions, or monitoring requirements of the permit. This letter must be attached to the original permit.

This permit is hereby modified unless a sufficient petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, Florida Statutes, as provided below. The procedures for petitioning for a hearing are set forth below. Mediation under Section 120.573, F.S., is not available for this proceeding.

NOTICE OF RIGHTS

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. The petition must contain the information set forth below and must be filed (received by the clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000.

Because the administrative hearing process is designed to redetermine final agency action on the application, the filing of a petition for an administrative hearing may result in further modification of the permit or even a denial of the application. If a sufficient petition for an administrative hearing or request for an extension of time to file a petition is timely filed, this permit modification automatically becomes only proposed agency action on the application subject to the result of the administrative review process. Accordingly, the applicant is advised not to commence construction or other activities under this permit modification until the deadlines noted below for filing a petition for an administrative hearing or request for an extension of time has expired.

Under Rule 62-110.106(4), Florida Administrative Code, a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an

administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon. If a request is filed late, the Department may still grant it upon a motion by the requesting party showing that the failure to file a request for an extension of time before the deadline was the result of excusable neglect.

In the event that a timely and sufficient petition for an administrative hearing is filed, other persons whose substantial interests will be affected by the outcome of the administrative process have the right to petition to intervene in the proceeding. Any intervention will be only at the discretion of the presiding judge upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing by the applicant must be filed within 14 days of receipt of this written notice. Petitions filed by any persons other than the applicant, and other than those entitled to written notice under Section 120.60(3), F.S., must be filed within 14 days of publication of the notice or within 14 days of receipt of the written notice, whichever occurs first.

Under Section 120.60(3), F.S., however, any person who has asked the Department for notice of agency action may file a petition within 14 days of receipt of such notice, regardless of the date of publication.

The petitioner shall mail a copy of the petition to the applicant at the address indicated above at the time of filing. The failure of any person to file a petition for an administrative hearing within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S.

In accordance with Rule 28-106.201, F.A.C., a petition that disputes the material facts on which the Department's action is based must contain the following information:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;

- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

A petition that does not dispute the material facts on which the Department's action is based shall state that no such facts are in dispute and otherwise shall contain the same information as set forth above, as required by Rule 28-106.301, F.A.C. Under Sections 120.569(2)(c) and (d), F.S., a petition for administrative hearing must be dismissed by the agency if the petition does not substantially comply with the above requirements or is untimely filed.


This action is final and effective on the date filed with the Clerk of the Department unless a petition is filed in accordance with the above. Upon the timely filing of a petition this order will not be effective until further order of the Department.

This permit modification constitutes an order of the Department. The applicant has the right to seek judicial review of the order under Section 120.68, F.S., by the filing of a notice of appeal under Rule 9.110 of the Florida Rules of Appellate Procedure with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000; and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed within 30 days from the date when the final order is filed with the Clerk of the Department.

When there has been no publication of notice of agency action or notice of proposed agency action as prescribed in Rule 62-110.106, F.A.C., a person may request a copy of the agency action. The Department shall upon receipt of such a request, if agency action has occurred, promptly provide the person with notice. The Department does not require notice of this agency action to be published. However, the applicant may elect to publish notice as prescribed in Rule 62-110.106, F.A.C., which constitutes notice to the public and establishes a time period for submittal of any petition.

If you have any questions regarding this matter, please contact Steve MacLeod at the letterhead address (add Mail Station 300) or by telephone at (850) 414-7806.

Sincerely,



Martin K. Seeling
Environmental Administrator
Bureau of Beaches & Coastal Systems

MKS/smm

cc: Matthew Miller, USACE, CESAJ-PD-EA
James McAdams, USACE, CESAJ-PD-EA
Paul Davis, Palm Beach County ERM
Lori Baer, Port of Palm Beach
Mary Duncan, FWC, ISMS
Kellie Youmans, FWC, ISMS
Jennifer Smith, DEP, SE District
Benjamin (Rob) Buda, BBCS-BECP
Mark Taynton, BBCS-CCCL
JCP Compliance Officer
BBCS Permit File

FILING AND ACKNOWLEDGMENT

FILED, on this date, pursuant to Section 120.52, Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

 2-8-2008
Deputy Clerk Date